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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
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11 STEVEN A. MCMAHON,) NO. SACV 10-00475-MAN
12 Plaintiff,)
13 v.) MEMORANDUM OPINION
14 MICHAEL J. ASTRUE,) AND ORDER
15 Commissioner of Social Security,)
16 Defendant.)
17

18 Plaintiff filed a Complaint on April 16, 2010, seeking review of
19 the denial by the Social Security Commissioner (the "Commissioner") of
20 plaintiff's application for a period of disability and disability
21 insurance benefits ("DIB"). On October 16, 2010, the parties consented,
22 pursuant to 28 U.S.C. § 636(c), to proceed before the undersigned United
23 States Magistrate Judge. The parties filed a Joint Stipulation on
24 December 17, 2010, in which: plaintiff seeks an order reversing the
25 Commissioner's decision and remanding this case for the payment of
26 benefits or, alternatively, for further administrative proceedings; and
27 defendant requests that the Commissioner's decision be affirmed or,
28 alternatively, remanded for further administrative proceedings. The

1 Court has taken the parties' Joint Stipulation under submission without
2 oral argument.

3
4 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**
5

6 Plaintiff filed an application for a period of disability and DIB.
7 (Administrative Record ("A.R.") 136-38.) Plaintiff claims to have been
8 disabled since January 1, 2003, due to blood clots, deep vein thrombosis
9 of the right leg, peripheral neuropathy, spinal stenosis, five
10 desiccated discs and bone spurs of the lower back, colitis, panic
11 attacks, generalized anxiety, post-traumatic syndrome, and depression.
12 (A.R. 75, 147.) Plaintiff has past relevant work experience as a tax
13 preparer, operation analyst, and administrative assistant and/or clerk.¹
14 (A.R. 18.)
15

16 After the Commissioner denied plaintiff's claim initially and upon
17 reconsideration (A.R. 12, 75-78), plaintiff requested a hearing (A.R.
18 82). On October 29, 2007, and September 22, 2008, plaintiff, who was
19 represented by counsel, appeared and testified at a hearing before
20 Administrative Law Judge Keith Dietterle (the "ALJ"). (A.R. 23-40, 54-
21 73.) Vocational expert David A. Rinehart and medical expert Alanson A.
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27 ¹ Although not discussed in the ALJ's decision, it appears that
28 plaintiff also has past relevant work experience as a home attendant.
(See, e.g., A.R. 37.)

1 Mason, M.D.² also testified at the September 22, 2008 hearing.³ (A.R.
2 23-40.) On January 21, 2009, the ALJ denied plaintiff's claim (A.R. 12-
3 19), and the Appeals Council subsequently denied plaintiff's request for
4 review of the ALJ's decision (A.R. 1-3). That decision is now at issue
5 in this action

6 7 **SUMMARY OF ADMINISTRATIVE DECISION** 8

9 The ALJ found that plaintiff has not engaged in substantial gainful
10 activity since January 1, 2003, the alleged onset date of plaintiff's
11 claimed disability. (A.R. 14.) The ALJ further found that plaintiff
12 last met the insured status requirements of the Social Security Act on
13 December 31, 2005. (*Id.*) The ALJ determined that plaintiff has the
14 severe impairment of back pain.⁴ (*Id.*) The ALJ also determined that
15 plaintiff does not have an impairment or combination of impairments that
16 meets or medically equals in severity any impairment listed in 20 C.F.R.
17 Part 404, Subpart P, Appendix 1 (20 C.F.R. §§ 404.1525 and 404.1526).
18 (A.R. 16.)
19

20 After reviewing the record, the ALJ determined that plaintiff has
21 the residual functional capacity ("RFC") to perform the full range of
22

23 ² Dr. Mason has a medical specialty in orthopedic surgery.
24 (A.R. 17, 379.)

25 ³ In his decision, the ALJ stated that vocational expert Kelly
26 Winn-Boaitey testified. (A.R. 12.) After carefully reviewing the
27 transcripts from both hearings, however, the Court cannot find any
evidence of such testimony.

28 ⁴ The ALJ also determined that plaintiff's impairment of
affective disorder is "non-severe." (A.R. 14.)

1 light work as defined in 20 CFR 404.1567(b). (*Id.*) Specifically, the
2 ALJ found that:

3
4 [Plaintiff] can occasionally lift and carry twenty pounds and
5 frequently lift and carry ten pounds. [Plaintiff] can stand
6 for a total of four hours in an eight-hour workday, walk for
7 a total of two hours in an eight-hour workday, and sit for a
8 total of six hours in an eight-hour workday. [Plaintiff] can
9 occasionally climb stairs and ramps, balance, stoop, kneel,
10 and crouch. [Plaintiff] cannot reach overhead, bilaterally.
11 [Plaintiff] cannot perform operations of foot controls on the
12 right side. [Plaintiff] is precluded from crawling and
13 climbing ladders or scaffolds. [Plaintiff] is also precluded
14 from working at unprotected heights and vibrations.

15
16 (*Id.*)
17

18 The ALJ concluded that plaintiff's past relevant work as a tax
19 preparer, operation analyst, and administrative assistant and/or clerk
20 does not require the performance of work-related activities precluded by
21 plaintiff's RFC. (A.R. 18.) Accordingly, the ALJ concluded that
22 plaintiff was not disabled within the meaning of the Social Security Act
23 from January 1, 2003, the alleged onset date, through December 31, 2005,
24 the date last insured. (A.R. 19.)
25

26 STANDARD OF REVIEW 27

28 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's

1 decision to determine whether it is free from legal error and supported
2 by substantial evidence in the record as a whole. Orn v. Astrue, 495
3 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "'such relevant
4 evidence as a reasonable mind might accept as adequate to support a
5 conclusion.'" *Id.* (citation omitted). The "evidence must be more than
6 a mere scintilla but not necessarily a preponderance." Connett v.
7 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). "While inferences from the
8 record can constitute substantial evidence, only those 'reasonably drawn
9 from the record' will suffice." Widmark v. Barnhart, 454 F.3d 1063,
10 1066 (9th Cir. 2006)(citation omitted).

11
12 Although this Court cannot substitute its discretion for that of
13 the Commissioner, the Court nonetheless must review the record as a
14 whole, "weighing both the evidence that supports and the evidence that
15 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of
16 Health and Hum. Servs., 846 F.2d 573, 576 (9th Cir. 1988); *see also*
17 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is
18 responsible for determining credibility, resolving conflicts in medical
19 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d
20 1035, 1039 (9th Cir. 1995).

21
22 The Court will uphold the Commissioner's decision when the evidence
23 is susceptible to more than one rational interpretation. Burch v.
24 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). However, the Court may
25 review only the reasons stated by the ALJ in his decision "and may not
26 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d
27 at 630; *see also* Connett, 340 F.3d at 874. The Court will not reverse
28 the Commissioner's decision if it is based on harmless error, which

exists only when it is "clear from the record that an ALJ's error was 'inconsequential to the ultimate nondisability determination.'" Robbins v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006)(quoting Stout v. Comm'r, 454 F.3d 1050, 1055 (9th Cir. 2006)); see also Burch, 400 F.3d at 679.

DISCUSSION

Plaintiff makes the following claims: (1) the ALJ failed to find plaintiff's vascular insufficiency of the right leg to be a "severe" impairment at step two; and (2) the ALJ did not properly assess plaintiff's credibility. (Joint Stipulation ("Joint Stip.") at 2.)

I. The ALJ's Failure To Consider Plaintiff's Vascular Insufficiency Of The Right Leg For Purposes Of Step Two Constitutes Error.

At step two of the sequential evaluation process, the ALJ is tasked with identifying a claimant's "severe" impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 404.1520(c). A severe impairment is one that "significantly limits [a claimant's] physical or mental ability to do basic work activities."⁵ 20 C.F.R. § 404.1520(c). Despite use of the term "severe," most circuits, including the Ninth Circuit, have held

⁵ Basic work activities are "the abilities and aptitudes necessary to do most jobs." 20 C.F.R. § 404.1521(b). Examples of such activities include: (1) "physical functions such as walking, sitting, lifting, pushing, pulling, reaching, carrying or handling"; (2) the capacity for "seeing, hearing, and speaking"; (3) "understanding, carrying out, and remembering simple instructions"; (4) the use of judgment; (5) "responding appropriately to supervision, co-workers and usual work situations"; and (6) "dealing with changes in routine work schedules." *Id.*

1 that the step two inquiry is "a de minimus screening device to dispose
2 of groundless claims." Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir.
3 1996). Accordingly, "[a]n impairment or combination of impairments may
4 be found 'not severe only if the evidence establishes a slight
5 abnormality that has no more than a minimal effect on [a claimant's]
6 ability to work.'" Webb v. Barnhart, 433 F.3d 683, 686-87 (9th Cir.
7 2005)(citation omitted); see Soc. Sec. Ruling 85-28, 1985 WL 56856, at
8 *3, 1985 SSR LEXIS 19, at *9 (stating that "[a] claim may be denied at
9 step two only if . . . a finding [that the relevant impairments are not
10 medically severe] is *clearly established by medical evidence*")(emphasis
11 added).

12
13 At step two of the sequential evaluation process, the ALJ
14 determined that plaintiff's back pain is a "severe" impairment and his
15 affective disorder is a "non-severe" mental impairment. (A.R. 14.) The
16 ALJ made no determination, however, regarding whether plaintiff's
17 vascular insufficiency of the right leg constitutes a severe impairment.
18 Plaintiff contends that the ALJ's failure to find plaintiff's vascular
19 insufficiency of the right leg to be a severe impairment constitutes
20 error. (Joint. Stip. at 2-3.)

21
22 At the October 2007 administrative hearing, plaintiff testified
23 that he has had deep vein thrombosis of the right leg since December
24 2004. (A.R. 65.) Plaintiff also testified that, during the relevant
25 disability period, he experienced six to eight "bad" days a month in
26 which he could not get out of bed due, in part, to pain in his right
27 leg. (A.R. 70.) While plaintiff testified that he takes medication to
28 ease the pain, he stated that his medication puts him to sleep,

1 rendering him incapable of working.⁶ (A.R. 68.) In addition to
2 plaintiff's pain testimony, plaintiff's disability report and medical
3 records contain reports of weakness, numbness, and swelling in
4 plaintiff's right leg as well as difficulties sitting and standing for
5 more than 30 minutes at a time.⁷ (See, e.g., A.R. 147 (cannot sit for
6 more than 30 minutes); A.R. 238 (pain, tenderness, and swelling of the
7 right leg); A.R. 249 (continued "numbness and weakness in the right
8 lower extremity"); A.R. 256 ("leg and foot weakness/numbness").)

9
10 The medical evidence of record confirms that plaintiff suffers from
11 deep vein thrombosis of the right leg. A January 5, 2006 Venous Doppler
12 study of plaintiff's right leg, for example, shows findings consistent
13 with deep vein thrombosis, including: "filing defects . . . in the deep
14 veins of the right leg"; "no sign of flow within the various structures
15 [of plaintiff's vessels]"; and "noncompressible" vessels.⁸ (A.R. 238.)

16

17 ⁶ Plaintiff testified that he takes Warfarin, an anticoagulant,
18 to treat his deep vein thrombosis. (A.R. 65, 152.) He further
19 testified that he wears compression stockings to prevent blood clots
from traveling to his heart and causing a heart attack and/or stroke.
(A.R. 68-69.)

20 ⁷ It is unclear from the record what role, if any, plaintiff's
21 back condition plays in plaintiff's right leg pain and functional
22 limitations. At the hearing, plaintiff testified to experiencing pain
which would "radiate from his buttock down to . . . [his] right leg."
(A.R. 64.) While plaintiff was originally told that he had sciatica,
23 plaintiff testified that later testing showed "something else [was]
wrong with [him]." (*Id.*) Plaintiff did not specify, and the Court
24 cannot determine, what this later testing showed. Notwithstanding this
testimony, based on plaintiff's other testimony as well as the medical
25 evidence of record, substantial evidence establishes that plaintiff's
impairment of vascular insufficiency of the right leg would have more
26 than a minimal effect on plaintiff's ability to work.

27 ⁸ While the Venous Doppler study was performed one month after
28 plaintiff's date last insured, the Ninth Circuit has stated that
"medical evaluations made after the expiration of a claimant's insured
status are relevant to an evaluation of the pre-expiration condition."

1 In addition, in a February 28, 2008 Medical Source Statement regarding
2 plaintiff's ability to do work-related physical activities, medical
3 expert Dr. Mason notes that plaintiff has a history of deep vein
4 thrombosis (A.R. 376), which is supported by medical evidence in the
5 record (A.R. 381, 383).

6
7 Based on plaintiff's testimony, as well as medical evidence in the
8 record, substantial evidence regarding the vascular insufficiency in
9 plaintiff's right leg was presented to the ALJ. The Court finds that
10 plaintiff's impairment of vascular insufficiency of the right leg would
11 have more than a minimal effect on plaintiff's ability to perform basic
12 work activities. Accordingly, the ALJ's failure to address plaintiff's
13 vascular insufficiency of the right leg constitutes error.

14
15 Moreover, and contrary to defendant's contention, the ALJ's failure
16 to address plaintiff's vascular insufficiency cannot be deemed harmless.
17 In general, an ALJ's failure to discuss a claimant's impairment at step
18 two may be harmless only when the ALJ's error did not prejudice a
19 claimant at later steps in the sequential evaluation process. In Burch,
20 for example, the Ninth Circuit assumed, without deciding, that it was
21 legal error for the ALJ not to discuss plaintiff's obesity in his step
22 two analysis. 400 F.3d at 682. The Ninth Circuit concluded, however,
23 that the assumed error was harmless, because it would not have impacted
24 the ALJ's analysis at either step four or five of the evaluation

25
26 Smith v. Bowen, 849 F.2d 1222, 1225 (9th Cir. 1988); see also Turner v.
27 Comm'r of Soc. Sec., 613 F.3d 1217, 1228-29 (9th Cir. 2010)(noting that
28 "[w]hile the ALJ must consider only impairments (and limitations and
restriction therefrom) that [plaintiff] had prior to the [date last
insured], evidence post-dating the [date last insured] is probative of
plaintiff's pre-[date last insured] disability").

1 process. Specifically, the Ninth Circuit found that, for purposes of
2 step four, plaintiff failed to point to any evidence of functional
3 limitations due to her obesity that would have impacted the ALJ's
4 analysis. *Id.* at 683. Further, at step five, the Ninth Circuit found
5 that no prejudice occurred, because the ALJ "adequately considered
6 [plaintiff's] obesity in his RFC determination" -- *i.e.*, there were no
7 "functional limitations as a result of [plaintiff's] obesity that the
8 ALJ failed to consider." *Id.* at 684; *see also Lewis v. Astrue*, 498 F.3d
9 909, 911 (9th Cir. 2007)(finding that any error the ALJ committed in
10 failing to list plaintiff's bursitis at step 2 was harmless, because the
11 ALJ "extensively discussed" plaintiff's bursitis and "considered any
12 limitations posed by the bursitis at [s]tep 4").

13
14 In this case, unlike in Burch and Lewis, the Court cannot conclude
15 that the ALJ's failure to consider plaintiff's vascular insufficiency of
16 the right leg is harmless error. In pertinent part, except for a
17 restriction in his RFC assessment that plaintiff not operate foot
18 controls with his right leg, there is no indication that the ALJ
19 properly considered plaintiff's vascular insufficiency of the right leg
20 or plaintiff's alleged attendant functional limitations and pain. As
21 discussed above, plaintiff has alleged significant functional
22 restrictions in his right leg during the disability period at issue --
23 including, *inter alia*, pain and swelling in his right leg; difficulties
24 sitting or standing for more than 30 minutes at a time; and 6-8 "bad"
25 days a month in which he could not get out of bed due, in part, to pain
26 in his right leg. Contrary to defendant's contention, plaintiff's
27 alleged functional restrictions exceed those found by the ALJ and, thus,
28 could have impacted the ALJ's RFC assessment.

1 Further, as discussed *infra*, the ALJ has not provided clear and
2 convincing reasons for rejecting plaintiff's alleged functional
3 restrictions and pain in his right leg. Accordingly, because the Court
4 cannot conclude that plaintiff was not prejudiced at a later step in the
5 sequential evaluation process, the Court cannot find the ALJ's error to
6 be harmless. See Stout, 454 F.3d at 1055 (finding an error to be
7 harmless when it "was nonprejudicial to the claimant or irrelevant to
8 the ALJ's ultimate disability conclusion").

9
10 **II. The ALJ Failed To Give Clear And Convincing Reasons For Finding**
11 **Plaintiff's Testimony To Be Not Credible.**

12
13 Once a disability claimant produces objective evidence of an
14 underlying impairment that is reasonably likely to be the source of his
15 subjective symptom(s), all subjective testimony as to the severity of
16 the symptoms must be considered. Moisa v. Barnhart, 367 F.3d 882, 885
17 (9th Cir. 2004); Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir.
18 1991)(*en banc*); see also 20 C.F.R. § 404.1529(a) (explaining how pain
19 and other symptoms are evaluated). "[U]nless an ALJ makes a finding of
20 malingering based on affirmative evidence thereof, he or she may only
21 find an applicant not credible by making specific findings as to
22 credibility and stating clear and convincing reasons for each."
23 Robbins, 466 F.3d at 883. The factors to be considered in weighing a
24 claimant's credibility include: (1) the claimant's reputation for
25 truthfulness; (2) inconsistencies either in the claimant's testimony or
26 between the claimant's testimony and his conduct; (3) the claimant's
27 daily activities; (4) the claimant's work record; and (5) testimony from
28 physicians and third parties concerning the nature, severity, and effect

1 of the symptoms of which the claimant complains. See Thomas v.
2 Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002); see also 20 C.F.R.
3 § 404.1529(c).

4
5 The ALJ found that plaintiff's "medically determinable impairments
6 could reasonably be expected to cause the alleged symptoms." (A.R. 18.)
7 Further, the ALJ cited no evidence of malingering by plaintiff.
8 Accordingly, the ALJ's reason for rejecting plaintiff's credibility must
9 be "clear and convincing."

10
11 In his decision, the ALJ stated that plaintiff's "statements
12 concerning the intensity, persistence and limiting effects of [his]
13 symptoms are not credible to the extent they are inconsistent with the
14 [RFC] assessment." (A.R. 18.) Specifically, the ALJ found plaintiff to
15 be not credible because: (1) plaintiff's "medical problems in
16 combination are managed by generally conservative and routine care which
17 includes medications and periodic office visits"; and (2) the objective
18 medical evidence does not corroborate plaintiff's subjective symptoms.
19 (*Id.*)

20
21 The ALJ's first ground for finding plaintiff to be not credible is
22 neither clear nor convincing. Contrary to the ALJ's contention,
23 plaintiff's medical conditions do not appear to be "managed" by his
24 medications and periodic office visits. For example, as discussed
25 above, plaintiff testified that, during the disability period at issue,
26 he experienced six to eight "bad" days a month, in which he could not
27 get out of bed due to pain in his back and leg. (A.R. 70) Although
28 plaintiff testified that he was able to ease his pain by lying down and

1 taking his pain medication, plaintiff also testified that his pain
2 medication "puts him to sleep," rendering him incapable of working.
3 (A.R. 66, 68.) Indeed, Dr. Mason, upon whose opinion the ALJ relied in
4 formulating plaintiff's RFC (A.R. 17), testified that he would expect a
5 person with plaintiff's medical conditions to have "fair" and "poor"
6 days, but not "a lot of good days" (A.R. 31). Dr. Mason also agreed
7 that it would be "medically reasonable" for a person with plaintiff's
8 condition to be "suffering" from plaintiff's alleged symptoms. (A.R.
9 31-32.) Accordingly, given plaintiff's testimony and that of Dr. Mason,
10 the ALJ's reason for discrediting plaintiff is neither clear nor
11 convincing.⁹

12
13 The ALJ's second ground for finding plaintiff to be not credible is
14 equally unavailing. To support his adverse credibility finding on the
15 second ground, the ALJ noted that Dr. Mason's physical examination of
16 plaintiff "failed to produce any significant objective findings."¹⁰
17 (A.R. 18.) The ALJ also noted that "there was no musculoskeletal

18
19 ⁹ Even assuming *arguendo* that plaintiff's condition could be
20 deemed to be "managed" by medications and routine office visits, there
21 is no indication that the ALJ considered the alleged side effects of
22 plaintiff's medications in the disability evaluation, as required. See
23 Erickson v. Shalala, 9 F.3d 813, 817-18 (9th Cir. 1993) (noting that an
24 ALJ must consider all factors, including the side effects of
25 medications, that might have a "significant impact on an individual's
ability to work") (citation omitted); see also Soc. Sec. Ruling 96-7p,
1996 WL 374186, at *2-*3, 1996 SSR LEXIS 4, at *7-*8 (noting that "type,
dosage, effectiveness, and side effects of any medication the individual
takes or has taken to alleviate pain or other symptoms" should be
considered in the disability evaluation); 20 C.F.R.
§ 404.1529(c)(3)(iv). This constitutes error.

26 ¹⁰ Contrary to the ALJ's statement, it does not appear that Dr.
27 Mason actually physically examined plaintiff. Rather, the record
28 indicates that Dr. Mason completed a Medical Source Statement after
having reviewed "exhibits selected for inclusion in the record of this
case." (A.R. 373, 385.)

1 examination more recent than January 2003" and "[a]side from an x-ray
2 report in 2002, . . . there [were] no imaging and/or x-ray reports,
3 which showed any significant problems." (*Id.*) In addition, the ALJ
4 stated that:

5
6 there was no objective evidence of atrophy in the extremities,
7 persistent neurological deficits (*i.e.*, reflex, motor or
8 sensory loss), or persistent inflammatory signs (heat,
9 redness, swelling, etc); there was no neuropathic pain, which
10 could be carried over a long period; and there was no evidence
11 of nerve irritations. Also, there are no indications that
12 this impairment would last for a continuous period of at least
13 12 months. Finally no physician has opined greater
14 limitations than [the ALJ] finds with respect to any
15 continuous period of at least 12 months.

16
17 (*Id.*)
18

19 With respect to the ALJ's contention that, aside from the x-ray
20 report in 2002, there are no imaging and/or x-ray reports that show any
21 significant problems, the ALJ appears to ignore or inaccurately
22 summarize the content of plaintiff's medical records. See Reddick v.
23 Chater, 157 F.3d 715, 723 (9th Cir. 1998)(reversing and remanding case,
24 because ALJ's characterization of the record was "not entirely accurate
25 regarding the content or tone"); see also Gallant v. Heckler, 753 F.2d
26 1450, 1456 (9th Cir. 1984)(holding that it was error for an ALJ to
27 ignore or misstate competent evidence in the record to justify his
28 conclusion). Contrary to the ALJ's contention, the record contains

1 imaging that appears to show that plaintiff has significant medical
2 problems. A January 23, 2003 CT scan of plaintiff's cervical spine, for
3 example, revealed that plaintiff has: (1) degenerative disc disease, a
4 moderate degree of central cervical stenosis, and blunting of the right
5 nerve root sleeve at the C4-5 location; (2) degenerative disc disease
6 and moderately severe central cervical stenosis with impingement on the
7 cervical cord at the C5-6 location; and (3) marked degenerative disc
8 disease, severe cervical stenosis with cord compression, marked
9 degenerative bony encroachment on the lateral recesses and neural
10 foramina bilaterally, marked truncation of the right side nerve root
11 sleeve, and an attenuated left side nerve root sleeve at the C6-7
12 location.¹¹ (A.R. 214-15.) In addition, a Venous Doppler study
13 performed on January 5, 2006, revealed that plaintiff has a filling
14 defect in multiple deep veins in his right leg that is consistent with
15 deep vein thrombosis. (A.R. 238) Clearly these imaging reports are not
16 insignificant, and thus, the ALJ's conclusion, based upon his improper
17 summarization of plaintiff's medical records, cannot constitute a clear
18 or convincing reason for finding plaintiff to be not credible.

19
20 Further, the ALJ's observation that plaintiff does not have any
21 objective evidence of atrophy, persistent neurological deficits,
22 persistent inflammatory signs, neuropathic pain, or nerve irritations is
23 unpersuasive. Significantly, the record is devoid of any medical
24 testimony, and the ALJ has not specifically identified any evidence, to
25

26
27 ¹¹ In addition, it appears that the ALJ ignored plaintiff's March
28 25, 2002 MRI of the lumbar spine which revealed "spinal stenosis and
foraminal narrowing . . . , with the greatest narrowing at [the] L-3 and
L5-S1 [locations]." (A.R. 286-87.)

1 support his observation.¹² See Valenzuela v. Astrue, 247 Fed Appx. 927,
2 929, 2007 WL 2693679 *1 (9th Cir. Sept. 10, 2007)(finding the ALJ's
3 credibility determination unsupported by substantial evidence, in part,
4 because there was no medical testimony to support ALJ's determination
5 that plaintiff lacked muscular atrophy); see also Morgan v. Comm'r of
6 Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999) (noting that, when
7 making a credibility determination, "[t]he ALJ must specifically
8 identify what testimony is credible and what testimony undermines the
9 claimant's complaints"). Thus, at present, the ALJ's observation is
10 unavailing, because it constitutes a medical opinion that the ALJ is not
11 qualified to make. See, e.g., Ananais v. Astrue, 2010 WL 129676, at *4,
12 2010 U.S. Dist. LEXIS 1420, at *12 (C.D. Cal. January 7, 2010).¹³

13
14 The ALJ's last two reasons for discrediting plaintiff are also
15 unavailing. First, the ALJ attempts to discredit plaintiff by stating
16 that there are no indications that "this impairment" would last for a
17 continuous period of at least 12 months. (A.R. 18.) The ALJ's
18 reference to "this impairment" is entirely unclear, and therefore,
19 without further specificity, this reason cannot constitute a clear or

20
21 ¹² Indeed, the ALJ noted that plaintiff has not had any
22 musculoskeletal examination since January 2003. (A.R. 18.)
23 Accordingly, it is unclear upon what medical evidence, if any, the ALJ
relied in determining that plaintiff does not have atrophy in his
extremities.

24 ¹³ Moreover, plaintiff's medical record contains evidence of
25 neurological deficits (i.e., sensory loss), inflammatory signs, and
26 nerve irritations. By way of example, plaintiff's CT scan of the lumbar
27 spine shows blunting of the C4-5 nerve root, impingement of the cervical
28 cord at the C5-6 location, cord compression at the C6-7 location, and a
truncated right side and attenuated left side nerve root sleeve at the
C6-7 location. (A.R. 214-15; see also A.R. 250 (polyneuropathy
bilaterally).) Additionally, as noted *supra*, plaintiff's medical record
and testimony indicate that plaintiff has weakness, numbness, and
swelling in his right leg.

1 convincing reason for discrediting plaintiff. Second, to the extent the
2 ALJ attempts to discredit plaintiff because no physician has opined
3 greater limitations than found by the ALJ, the ALJ's reasoning is
4 unpersuasive. Significantly, it appear that Dr. Mason, upon whom the
5 ALJ relied in assessing plaintiff's RFC, is the only physician to assess
6 plaintiff's limitations specifically. However, in a letter dated
7 September 23, 2009, plaintiff's treating physician, Arun Budhraj, M.D.
8 noted, *inter alia*, that plaintiff's pain continues to worsen and that,
9 if plaintiff sits or stands for more than 30 minutes, he experiences
10 "extreme pain whereupon he needs to take pain medication and lie flat
11 for two hours to reduce the pressure on his neck and back." (A.R. 397.)
12 These limitations, as noted by plaintiff's treating physician, clearly
13 exceed those identified by the ALJ in plaintiff's RFC.

14
15 Moreover, and significantly, the ALJ's above reasoning is
16 unconvincing, because the failure of the medical record to corroborate
17 fully plaintiff's subjective symptom testimony is not, by itself, a
18 legally sufficient basis for rejecting such testimony. Rollins v.
19 Massanari, 261 F.3d 853, 856 (9th Cir. 2001); Bunnell, 947 F.2d at 347
20 (noting that "[i]f an adjudicator could reject a claim of disability
21 simply because [plaintiff] fails to produce evidence supporting the
22 severity of the pain there would be no reason for an adjudicator to
23 consider anything other than medical findings"). Accordingly, the ALJ's
24 finding that the objective evidence does not support the extent of
25 plaintiff's physical complaints cannot, by itself, constitute a clear
26 and convincing reason for discrediting plaintiff's testimony. See
27 Varney v. Secretary, 846 F.2d 581, 584 (9th Cir. 1988); Cotten v. Bowen,
28 799 F.2d 1403, 1407 (9th Cir. 1986); see also Burch, 400 F.3d at 681.

1 Accordingly, for the aforementioned reasons, the ALJ failed to give
2 clear and convincing reasons, as required, for discrediting plaintiff.
3

4 **III. Remand Is Required.**
5

6 The decision whether to remand for further proceedings or order an
7 immediate award of benefits is within the district court's discretion.
8 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no
9 useful purpose would be served by further administrative proceedings, or
10 where the record has been fully developed, it is appropriate to exercise
11 this discretion to direct an immediate award of benefits. *Id.* at 1179
12 ("[T]he decision of whether to remand for further proceedings turns upon
13 the likely utility of such proceedings."). However, where there are
14 outstanding issues that must be resolved before a determination of
15 disability can be made, and it is not clear from the record that the ALJ
16 would be required to find the claimant disabled if all the evidence were
17 properly evaluated, remand is appropriate. *Id.* at 1179-81.
18

19 Remand is the appropriate remedy to allow the ALJ the opportunity
20 to remedy the above-mentioned deficiencies and errors. *See, e.g.,*
21 Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004)(remand for
22 further proceedings is appropriate if enhancement of the record would be
23 useful); McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir. 1989)
24 (remand appropriate to remedy defects in the record).
25

26 On remand, the ALJ must correct the above-mentioned deficiencies
27 and errors. After so doing, the ALJ may need to reassess plaintiff's
28 RFC, in which case, additional testimony from a vocational expert likely

1 will be needed to determine what work, if any, plaintiff can perform.

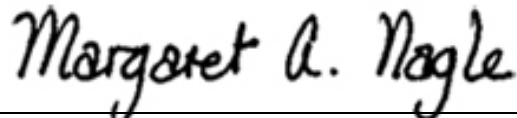
2
3 **CONCLUSION**

4
5 Accordingly, for the reasons stated above, IT IS ORDERED that the
6 decision of the Commissioner is REVERSED, and this case is REMANDED for
7 further proceedings consistent with this Memorandum Opinion and Order.

8
9 IT IS FURTHER ORDERED that the Clerk of the Court shall serve
10 copies of this Memorandum Opinion and Order and the Judgment on counsel
11 for plaintiff and for defendant.

12
13 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

14
15 DATED: June 6, 2011

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18 MARGARET A. NAGLE
19 UNITED STATES MAGISTRATE JUDGE
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